SUPREME COURT U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [illegible]

ABBOTT ESTRIN, individually and as President of Abbott Exterminating Company and Abbott Exterminating Company, a corporation,

Appellant

v.

W. F. MOSS, Commissioner of Agriculture of Tennessee; H. L. BRUER, Director, Division of Plant Industries in the Tennessee Department of Agriculture; and GEORGE F. McCANLESS, Attorney General of Tennessee

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT AS TO JURISDICTION

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APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

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STATEMENT AS TO JURISDICTION

The Appellant, pursuant to Rules 13(2) and 15 of the United States Supreme Court, files this statement of the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Tennessee in denying Appellant's Petition for an Injunction and why the Court should exercise such jurisdiction in this case.

OPINION BELOW

The Opinion of the Supreme Court of the State of Tennessee denying rehearing in this proceeding was entered on July 25, 1968. This Opinion is not reported. The Opinion of the Supreme Court of Tennessee denying Appellant's appeal from the judgment of the Chancery Court of Davidson County, Tennessee, was issued on June 26, 1968. It is reported at 430 S.W.2d 345. The opinion of the Chancellor of Davidson County was entered on July 6, 1967. This Opinion is not reported.

JURISDICTION

This appeal is from a final judgment entered by the Supreme Court of the State of Tennessee, dismissing Appellant's Petition which prayed for a preliminary and permanent injunction against the enforcement of Chapter VI of Title 43 of the Tennessee Code. Because of the length of this statute, it is set forth as Appendix c, *infra* (App. c-1). It is reported in Tennessee Code annotated, Vol. 8, Page 83, officially cited as 43-609 T.C.A. *et seq.* Appellant's Petition before the Supreme Court of the State of Tennessee alleged that the above-referenced statute as a matter of law and as administered denied him both due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The action was dismissed by final order, denying the Petition for rehearing dated July 25, 1968. Notice of appeal was filed on August 20, 1968.

This Court has jurisdiction on direct appeal to review said judgment below under 28 U.S.C. 1257(2) and the following decisions sustain that jurisdiction: *Winters v. New York*, 333 U.S. 507 (1948); *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931); *Weston v. City Council of Charleston*, 27 U.S. 448 (1829).

QUESTIONS PRESENTED

1. Can the state establish tax classifications, the reasonableness of which classifications cannot be reviewed or set aside by an appellate Court on the grounds that the legislation's judgment constitutes a "question of public policy" which are "considerations solely for the legislature"?

2. Can the state establish a tax which results in marked inequality of application so long as it applies uniformly to a general class?

3. Does a state agent have unlimited discretionary power to revoke a business license if that power is only one of the powers granted to him by statute?

STATEMENT OF THE CASE

The instant proceeding is an appeal from a decision of the Supreme Court of the State of Tennessee denying Appellant's Petition for a permanent injunction against the enforcement of certain provisions of Chapter VI of Title 43 of the Tennessee Code (Insect Pests, Rodents, and Plant Disease Control and Eradication), on the grounds that it violates the Fourteenth Amendment to the Constitution of the United States. This chapter of the Tennessee Code establishes the authority of the Appellee to license and regulate pest control operators such as Appellant, Abbott Estrin. Both Mr. Estrin and his wholly owned Abbott Exterminating Company operate under authority of a pest control license issued by Appellee, which license is the subject of a revocation proceeding by Appellee for the failure of Appellant to pay certain fees called for in the statute. Appellant has contended these fees are unconstitutional as they apply to only one sub-category of the ten licensed classes of pest control operators.

Appellant's qualification as an exterminator is not in issue in this proceeding. Since notice of revocation was served on Appellant by Appellee, Mr. Estrin has received two license renewals during the stay issued against Appellee and has been employed by the federal government, the

State of Tennessee, the City of Nashville, and Davidson County. The sole issue before the Supreme Court was whether the statute under which Appellee sought to revoke Appellant's license to do business denied Appellant the right of Equal Protection guaranteed to him by both the Constitutions of the United States and the State of Tennessee, and whether the Appellee denied to Appellant the right of due process of law.

Chapter VI of Title 43 of the Tennessee Code[1] establishes regulatory control over pest control operators by the State Agricultural Commissioner, Appellee. Section 43-613 of the Tennessee Code requires that each exterminator pay a special fee for termite control jobs. While termite control is not one of the ten categories of licensed qualifications enumerated in the statute, termite extermination is treated differently than other pest control jobs. In addition to the monthly reports of all pest control jobs performed by an exterminator for which no fee is required, any exterminator who performs termite control jobs must file with Appellee a copy of each contract and a three dollar fee per contract. No other special requirement is imposed by the statute to distinguish termite extermination from that of any other pest. The regulations of the Agriculture Commissioner set forth requirements (App. d-1) for termite control not specified in the statute, but the dangers to the public in termite control are far less than that in other forms of pest control for which no fee is required with the monthly report. (Affidavit of L. A. Meis, App. e-1) Similar regulations exist for extermination using highly poisonous gas for which no reporting fee is required. While Section 10 of Section VI of the regulations (App. d-1) permits Appellee to inspect termite extermination jobs "at such times as he may deem desirable". Section 9 permits Appellee to inspect all pest control jobs "from time to time . . . as seems best to the Department". Thus, the

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[1] Hereinafter cited as 43-610 Tennessee Code, *et seq.*

record shows nothing in the statute or regulations of Appellee which makes termite extermination more dangerous to the public than other forms of pest control and, in fact, it is less so. Nothing in the statute requires Appellee to perform more inspections on termite control work than other forms of pest control and, in fact, Appellee's agents do not do so. Thus, the cost of inspecting termite control jobs is not by statute, regulation, or fact any greater than the cost of inspecting other pest control jobs, but only termite extermination jobs are burdened with a fee to pay part of Appellee's total overhead. Section 43-618 places all funds collected (licenses, termite contract fees, etc.) into the treasury for use by Appellee.

Under Section 43-610 of the Tennessee Code (App. C-1), pest control operators may separately qualify for and be licensed to practice in any or all of ten separate enumerated fields.[2] A single license is issued to each operator covering his qualifications in any or all of these fields. The statute does not specify termite control as a separate licensed qualification, as it apparently falls under the general statutory category of "structural pest control, household pest control".

The statute permits a single termite extermination contract to be executed for an entire housing development or a single dwelling, so that smaller operators working on homes pay a substantially larger percentage of their gross income for fees than do the large operators who secure major contracts, such as government installations.

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[2] "Consulting entomology, general; consulting plant pathology, general; structural pest control, household pest control; storage, warehouse, and transportation pest control; fumigation; agricultural pest and disease control, general; agricultural pest and disease control, aircraft application; control of insects affecting men and animals; horticultural spraying; and rodent control." These classifications are briefly discussed in the affidavit of L. A. Meis (App. e-1), relying on standard sources on pest control to illuminate the nature of the treatment used by pest control operators in each class.

Although licensed in several fields, Mr. Estrin does perform termite control jobs. Under the terms of the statute, Mr. Estrin was required to pay the three dollar filing fee for each contract. Section 43-613 of the Tennessee Code further provides that:

> "If any licensed pest control operator shall fail, neglect, or refuse to file the monthly report required above, by or before the specified date, such operator shall be required to pay a penalty of $5.00 and an additional penalty for contracts that are not filed by the specified date in the amount of 10% of the operation fee required by this section for such contracts."

In January of 1967 and again in February, Appellant received a document from the Appellee entitled "Notice of Intent to Revoke License". The provisions of Section 43-614 of the Tennessee Code provide for suspension of a pest control operator's license "(3) If the license holder shall fail to make the registrations and/or reports required in Section 43-611 and 43-613 or shall fail to pay the fees required herein."[3] The act further provides that: "Any license may be revoked by the Commissioner of Agriculture for any of the above reasons when violations are willful or persistent or for any serious or flagrant violation of the requirements of this act or regulations promulgated thereunder." There had been no previous charge of failure to pay the fee. The first notice the Appellant received from the State was an order analogous to one to show cause why his license to do business should not be revoked. The order itself stated that Appellee charges "that the aforesaid violations constitute willful, persistent, serious, and flagrant violations of the requirements of Chapter VI of Title 43 of the Tennessee Code . . . and that the aforesaid violations are sufficient for revocation of the aforesaid license No. 1790."

---

[3]Section 43-617 of the Tennessee Code makes any violation of the pest control statute a criminal misdemeanor.

Upon receipt of the "Notice of Revocation", Appellant attempted to pay the fees and fines prescribed by the statute and take the matter of the statute's validity to the Courts, but as shown by the Affidavit of Herbert L. Rich, Esq. (App. f-1), Appellant was informed by Appellee's agents that only surrender of Appellant's license was acceptable to Appellee.

Appellant sought a preliminary and permanent injunction against Appellee from enforcement of Section 43-617 of the Tennessee Code (Revocation of License). The Chancery Court of Davidson County, in a brief decision, concluded "that Tennessee Code Annotated Sections 43-609 through 43-618 do not violate the Constitutions of the United States and the State of Tennessee. . . ." Appeal from the decision of the Chancery Court was taken to the Supreme Court of Tennessee.

The Supreme Court of Tennessee, in considering Appellant's assertion that the fee provisions for termite exterminating jobs of the Tennessee Code (Section 43-613) violated the equal protection provisions of the Constitution of the United States, held:

> "[W]e do not think it arbitrary or unreasonable to place the business of termite extermination into a single class for the purpose of regulation. No licensed pest control operator has been singled out or discriminated against. All persons, or other entities, engaged in the business of termite extermination must follow the same regulations.
>
> Complainant insists no reason is given in the body of the statute for classifying the business of termite extermination in Section 43-613, and urges that this failure to give a reason renders it unconstitutional. We see no merit in this argument.
>
> The question of whether the business of termite eradication should be regulated to the extent indicated by this Section is a question of public policy, public policy being the present concept of the public welfare or general good . . . . This Court has

> nothing to do with questions of policy . . . . These are considerations solely for the Legislature . . . .
>
> We are of the opinion it is unnecessary the legislature spell out in the body of a particular Act its reasons for adopting one particular policy or another. 'The Courts cannot require the legislature to specify its reasons for a classification.'"

The Court avoided meeting Appellant's assertion that the sub-category of termite control operators for the purpose of taxation was unreasonable and arbitrary. The Court noted that termite operators use dangerous poisons near homes in a manner prescribed by specific Agriculture Department regulations (App. d-1). The Court overlooked the point that the other untaxed classes of exterminators use even more dangerous poisons in or near homes pursuant to other specific Agriculture Department Regulations as fumigators, and no tax is imposed on this class of pest control operators.

In regard to the unreasonableness of the inequality of the fee imposed per contract, the Court stated:

> "Complainant also argues that Section 43-613 unjustly discriminates against the smaller businesses engaged in termite extermination since it requires a fee of $3.00 for each contract regardless of the size of the contract, whether the contract covers a single house or a large commercial complex, Complainant insists this requirement results in inequality.
>
> A classification is not unconstitutional merely because in practice it results in some inequality, where the classification has a reasonable basis.
>
> So long as the regulation applies equally and consistently to all persons in the same class under similar facts and circumstances, the inequality or differential in the total amount of fees paid is not unconstitutional."

Here the Court again assumed, but made no effort to find a reasonable basis outside the statute to support the inequalities resulting from the tax classification imposed by

the statute by contract rather than by size of the job.

Finally, in reviewing Appellant's assertion that the procedures invoked by Appellee were tantamount to prejudgment that Appellant's license should be revoked, the Court ruled:

> "Complainant argues four basic reasons for finding the Section in violation of due process: No hearing is required for the suspension of a license; any person who receives notice of suspension or revocation of his license must apply in writing to the Commissioner in order to obtain a hearing; the burden of proof is placed on the recipient of a notice of intention to revoke license; and that the Commissioner before whom the hearing must be held acts as both judge and prosecutor, thus he is not fair and impartial as required by due process."

* * *

The Court ignored the fact that Appellant had never previously been charged with any violations of the Code, or that Appellee had not considered whether the less stringent remedy of penalties provided by the statute might in justice be employed. Appellee's refusal to consider tender of the fees and penalties under protest and the Appellee's unswerving determination to revoke Appellant's license so tainted the due process rights of Appellant as to deny him the fundamental right of a fair forum.

From January, 1967 to the present, the proceeding to revoke Appellant's license before the State Agricultural Commissioner was stayed by the Court with the gracious consent of the Assistant Attorney General of the State of Tennessee. This stay has been extended by the Supreme Court of Tennessee pending the decision of this Court. In the interim, the Appellant's license has been renewed yearly and no question of Appellant's basic qualifications had been raised. On August 20, 1968, Notice of Appeal to the Supreme Court of the United States was filed. After this, on September 3, 1968, new notices to revoke Appellant's current license to do business were served on Appellant by Appellee.

QUESTIONS PRESENTED ARE SUBSTANTIAL

The Classification is Arbitrary and Unreasonable

The issues involved in this Appeal seek to clarify the power of a state to establish sub-classes of a regulated industry for the purposes of taxation, which tax excludes the remaining regulated classes. Appellant has contended before the Supreme Court of the State of Tennessee that Tennessee's regulatory scheme over pest control operators, as a general class, denies to those pest control operators doing termite control, as Appellant, the protection provided by the Equal Protection provision of the Fourteenth Amendment of the Constitution of the United States. The Tennessee Supreme Court in rejecting this assertion concluded that it is:

> "Neither arbitrary nor unreasonable to place the business of termite extermination into a single class for purposes of regulation. No licensed pest control operator has been singled out or discriminated against. All persons, or other entities, engaged in the business of termite extermination must follow the same regulations."

The Court did not consider whether the Tennessee Legislature acted reasonably in establishing termite control as a separate group required to pay a fee for each job, as opposed to other forms of pest control. The Court never considered the question of reasonableness of the statute as "this Court has nothing to do with questions of policy". It is respectfully submitted that whenever the protections of the Fourteenth Amendment are so raised, the State's Courts have a positive duty to see whether the classification imposed by the legislature is palpably arbitrary or unreasonable.

The rule is well settled that the tax classes among groups established by a state must rest upon some ground or difference having a fair and substantial relation to the object of the legislation. If the classification is found on a reasonable distinguishable difference in state policy, it is

not arbitrary, *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959). This policy may be found in the language of the statute, its history, or in reasonable interpretation, but the fact that it is state policy to classify in a certain manner is not justification in itself. While, admittedly, the state has a wide discretion in taxation, the Supreme Court of Tennessee extended this concept of wide discretion to give *carte blanche* to the Tennessee legislature to impose whatever tax it desires upon any group or class so long as it doesn't apply it to individuals. The Court overlooks the fact that the language of the statute or its history gives no guidelines and does not satisfy the protections of the Fourteenth Amendment which requires the Court to go a step further and examine if, in fact, the legislative scheme of classification is arbitrary, unreasonable or illusory. *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

It is clear that all pest control operators use poisons dangerous to man, plants, and animals (App. e-1). For this reason, the state has established a requirement that the State Agricultural Commission license and regulate all classes of pest control operators (43-610 T.C.). The statute further provides for license revocation or suspension for those pest control operators who breach the State Agricultural Commission's regulations. The classification of termite control is not enumerated in the statute's licensing classification (43-610 T.C.). It is solely set forth in the provision (43-613 T.C.) requiring all pest control operators to file monthly reports and imposing the additional requirement that termite jobs be performed under separate contract copies of which are filed with a three dollar fee.

All pest control operators pay a basic license fee, which fees go into the general fund of the State Agricultural Commission. This fund underwrites, among other things, part of the cost of providing inspectors for pest control jobs. While all pest control operators are subject to inspection, only termite control operators pay a fee for each contract they perform. The poisons and procedures used by operators performing termite control, as shown in App. e-1 (Affi-

davit of L. A. Meis) are, in fact, less dangerous to man, plants and animals than the other licensed categories of pest control. There is no reason or provision in either the statute or regulation for operators performing termite control to receive more state inspection than other pest control operators and, in fact, they do not receive any more frequent or detailed inspection than any other form of pest control operator. There is no apparent distinction in the record between termite control and other forms of non-taxed structural pest control other than the fact that the former exterminate termites rather than rats, mice, roaches or other structural vermin or pests as fungi, although he may do both jobs at the same time.

The Tennessee State Supreme Court, in prior opinions, has noted that the Tennessee Constitution, as well as the Fourteenth Amendment of the Constitution of the United States, precludes the unreasonable establishment of artificial tax categories. In *Corn v. Fort*, 170 Tenn. 377, 95 S.W.2d 620 (1936), the Court held that there was no valid distinction between a partnership and individual performing the same job and so set aside a tax imposed on partnerships and corporations, but excluding individuals.

So, too, in *Logan's Supermarkets v. Atkins*, 202 Tenn. 438, 304 S.W.2d 628 (1957), the Tennessee Supreme Court held that tax on merchants using trading stamp companies, while exempting those giving or redeeming their own stamps or hiring others to redeem company-owned stamps, was an arbitrary, capricious and unreasonable classification in violation of the state and federal constitutions because there was no real or substantial difference. In neither case did the Court conclude that these classifications were sufficient as state "policy". Certainly a Court that can determine the lack of justification for the legislature to tax partnerships but not individuals doing the same job can review the reasonableness of a tax on termite control but not on fumigation of the same structure.

State Courts have uniformly held that there must be something in the one mode of doing business which makes it unique to justify classification for tax purposes over another mode of the same business, *Rebsamen Motor Co. v. Phillips*, 226 Ark. 146, 289 S.W.2d 170 (1956) (automobile franchised dealers taxed, unfranchised dealers exempted); *Segal v. Simpson*, 121 So. 2d 790 (1960) (taxes on bottle clubs with live entertainment, exempting those with non-live entertainment); *Palmer Park Theatre Co. v. City of Highland Park*, 362 Mich. 326, 106 N.W.2d 845 (1961) (tax on water-cooled air conditioners of five tons or more, exempting units under five tons where it was shown that they both use the same amount of water, ton for ton).

The State of Tennessee in the instant proceeding has raised a novel precedent that a state can be unreasonable in establishing tax classifications so long as it is uniformly unreasonable and applies the tax to all persons bearing the same title. In the absence of any justification in the language of the statute or reasonable interpretation of the legislative rationale for imposing a fee on termite control not imposed on fumigation, crop dusting, or other forms of pest control, the Court should have struck down the statute as contravening the Equal Protection provisions of the Fourteenth Amendment.

Inequality of Application

The statute in question raises a further substantial federal question as to the taxing criteria of permitting large contracts, such as housing developments, county or state contracts to be reported with a single filing fee of $3.00 by major exterminating operators, as opposed to the small individual operators who must report each home under a separate contract and pay a substantial portion of their charges in tax. The Court deems that such classifications are not unconstitutional merely because in practice it results in inequality if the classification has a reasonable basis. The Court then aborts its duty to go further and look into the

question of whether, in fact, the classification has a basis in reason. By the classification, a large operator has a proportionately greater percentage of profits per job than the small operator and pays substantially less proportionately to the state for the cost of periodically inspecting the large jobs than does the small operator toward the periodic inspection of his small jobs. Since neither the statute nor its legislative history specifies how the $3.00 per contract fee is to be used, it must be assumed that it is in some way related to underwriting the inspections of termite extermination jobs. Obviously, the larger the job the greater the time and cost of inspection. For this reason, the Court's failure to determine the reasonableness of the inequities of the classification as requested by Appellant is tantamount to failure of the Court to provide to the Appellant and other small operators the equal protection and due process rights of the Fourteenth Amendment. *People v. Issaacs*, 22,Ill.2d 477, 176 N.E.2d 889 (1961).

The Appellee's Procedure Violates Due Process Ab Initio

Section 43-613 of the Tennessee Code provides for penalty of $5.00 and additional penalties of 10% on all termite exterminating contracts which are not reported to the state. Where the operator has failed to make such reports or pay the fees, Section 43-614 empowers the State Agricultural Commissioner to suspend the license of the operator after hearing "until the violations or circumstances causing such suspension have been corrected or removed to the satisfaction of the Commissioner of Agriculture". Further, the Commissioner, when finding such violations are "willful or persistent or for any serious or flagrant violation of the requirement of this act or regulations" may revoke the license. The Appellee did not seek to suspend Appellant's license or collect fees and fines, but *ab initio* sought to revoke his license thereby indicating Appellee's predetermination that the failure of Appellant to file monthly termite

contracts and pay the fees was a violation which was "willful," "persistent," "serious" and "flagrant".

The pest control legislation herein not only establishes the Agricultural Commissioner as a person who serves the notice of violation, but also appoints the judge, and holds the right of review. It would, therefore, appear from the face of the notice that the Appellee *ab initio* determined that Appellant was a serious and willful violator of the state Code. The Appellee refused to accept tender of the fees and fines as prescribed by the Code or to consider any other procedure except revocation of license (App. f-1). It would, therefore, appear the Appelleee prejudged the case of Mr. Estrin to the point that the only result of the proceeding would or could be revocation of license. Such a prejudgment of the facts and the discretionary relief to be applied by the Agricultural Commissioner removes the barest pretense of the state's giving to the Appellant any rights of due process of law and in its place substitute a kangaroo court determined to put the Appellant out of business. To give such power to the Appellee makes him judge, jury and executioner without the tempering mercy of judicial review. The Tennessee Supreme Court has rejected this contention, holding that it can only presume that the act will be administered in full compliance with the State and Federal Constitutions. Such compliance requires the fundamental right of due process and due process is foreclosed when the expressed position of the agency administrator from the first moment of the case is one of immediate termination of Appellant's business without consideration of the other forms of relief or tender of the fees and fines prescribed by the statute. This absolute power of the Appellee is particularly oppressive when it is remembered that this procedure enables him to additionally charge the Appellant with a criminal misdemeanor where his discretion sees fit. Mere judicial review by the Tennessee Supreme Court of whether Appellee acted within his statutory power does not overcome the effect of this prejudgment. In a criminal proceeding, such prejudgment would be grounds for immediate reversal. The fact

that the state is here dealing with the execution of a man's business rather than his person may temper the attitude of the Court, but should have required it no less to protect Appellant's right of fundamental due process.

Due process requires the Appellee to treat Appellant with the proper attitude, as well as proper process. Since it was obviously the legislative scheme to permit a fine for failure to file these termite contracts and to permit the suspension of the license for a period of time until these fees and penalties are paid, unless the violations were "willful", "persistent", "serious", or "flagrant", the use of the extreme procedure of revocation *ab initio* is indicative of such predisposition on the part of the Appellee that the Appellant was denied due process *per se*.

It must be remembered that the sole question of the Appellant's qualifications to do business was related to his failing to file the termite contracts and pay fees. No question of Appellant's qualifications as an exterminator has ever been raised by the state. In fact, for two years subsequent to the notice of revocation, new licenses have been issued to the Appellant. Therefore, the Appellee has taken the power upon himself to revoke Appellant's license solely because of the license fee or taxing statute provision and despite Appellant's offer to fully comply with all terms of the statute regarding fees and penalties. It is respectfully submitted that such untempered power deprives the Appellant of due process in every sense of the term.

We believe the questions presented by this Appeal are substantial, that they are of public importance, and should be considered by this Court.

Respectfully submitted,

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Washington, D.C. 20024
Attorney for Appellant

PROOF OF SERVICE

I, Robert W. Healy, attorney for Appellant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1968, I served a copy of the foregoing statement as to jurisdiction on the several parties hereto by mailing said copies in a duly addressed envelope with first-class postage prepaid to their attorneys of record, Paul E. Jennings, Esquire, Assistant Attorney General, State of Tennessee, Supreme Court Building, Nashville, Tennessee, 37219.

Washington, D.C., this ___ day of October, 1968.

ROBERT W. HEALY
1257 - 4th Street, S.W.
Washington, D.C. 20024
Attorney for Appellant

APPENDIX A

SUPREME COURT OF THE STATE OF TENNESSEE

ABBOTT ESTRIN,

Appellant,

v.

DAVIDSON EQUITY
HONORABLE ALFRED T. ADAMS,
CHANCELLOR.

W. F. MOSS, Commissioner of Agriculture of Tennessee,

Appellee.

FOR APPELLANT:

BEN WEST,
NASHVILLE, TENNESSEE.

FOR APPELLEE:

GEORGE F. McCANLESS,
Attorney General,
PAUL E. JENNINGS,
Assistant Attorney General,
NASHVILLE, TENNESSEE.

OPINION

This is an appeal from a decree of the Chancery Court upholding the constitutionality of Chapter 14 and Chapter 53 of the Public Acts of Tennessee, 1955 and 1961, respectively, codified as T. C. A. Chapter 6 of Title 43, Sections 609-618, inclusive. We affirm the Chancellor.

We will refer to the parties as they appeared in the trial court. Complainant, Abbott Estrin, is President of the Abbott Exterminating Company, a Tennessee corporation. The Company is engaged in the business of pest control and services customers in this and neighboring states. Pest control operators are regulated by the provisions of T. C. A. Sections 43-609–43-618, inclusive.

Defendant, W. F. Moss, Commissioner of Agriculture, is authorized and required to promulgate rules and regulations for the enforcement of the law.

T. C. A. Section 43-610 establishes a pest control licensing board.

T. C. A. Section 43-613 provides:

"Every licensed pest control operator shall enter into a written contract with the person, firm, or corporation employing him to prevent, control or eradicate termites and a separate contract must be given for each structure or building except that an industrial complex or group of buildings may be covered by a single contract when they are integral parts of one industrial unit, and a garage, pump house, or other outbuilding commonly a part of a residential establishment may be covered by the same contract as that covering the residence itself provided such garages, etc., are not used as separate residential units. In the case of pretreatment of new structures the contracts or warranties required by the federal housing administration, the veterans administration, or other federal agency, shall be construed to be contracts and deemed sufficient to satisfy the requirements of this section. Each licensed pest control operator shall be required to report each month's business to the department of agriculture within fifteen (15) days of the end of each calendar month. At the time the licensed pest control operator files his report of the previous month's business he shall be required to file with the commissioner of agriculture a copy of all contracts for termite service issued during the period covered by the report and shall pay to the department of agri- ($3.00 for each contract so reported. If any licensed pest control operator shall fail, neglect, or refuse to file the monthly report required above, by or before the specified date, such operator shall be required to pay a penalty of five dollars ($5.00) and an additional penalty for contracts that are not filed by the specified date in the amount of ten per cent (10%) of the operation fees required by this section for such contracts."

T.C.A. Section 43-614 provides, in part:

"Any license may be suspended by the commissioner of agriculture after a hearing for any of the following causes:

* * *

"(4) If the license holder shall fail to make the registrations and/or reports required in Sections 43-611 and 43-613 or shall fail to pay the fees required therein."

In January of 1967, complainant received a letter from the Commissioner. This letter was entitled: "Notice of intention to revoke license." The letter stated the grounds for revocation were, "failure to file with the Commissioner of Agriculture a copy of the contracts for termite service which are listed below and with failure to pay the Department of Agriculture an operation fee of $3.00 on each of the below listed contracts." A list of several hundred unreported contracts followed.

The letter set forth the provisions of the statute under which revocation was being instituted and complainant's right to a hearing, if requested.

Complainant received another letter from the Commissioner in February, 1967, which charged complainant with further similar violations as the first letter and listed several hundred new contracts unreported.

These letters were filed as exhibits to complainant's bill filed on March 8, 1967, which sought to restrain further action by the Commissioner on the ground T.C.A. Sections 43-609 through 43-618 were unconstitutional. The letters and a copy of "Rules and Regulations Governing Pest Control Operators," (Tennessee Department of Agriculture) are the only exhibits in the record.

Complainant insists Chapter 6 of Title 43 T.C.A. violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Section 8 of Articles 1 and 11 of the Constitution of Tennessee as an unlawful classification of the pest control industry and an unconstitutional exercise of the police power of the legislature of this State.

If the legislation is for the beneficial interest of the public health, then it constitutes a reasonable exercise of

police power, and is exclusively for the determination of the legislature and not subject to judicial review. Tennessee Board of Dispensing Opticians v. Eyear Corp., 218 Tenn., 60, 400 S.W. (2d) 734 (1966).

The power of the legislature to regulate business is a valid exercise of the police power of the State.

> "The legislature of the State cannot prohibit an ordinary business but it may, regulate the business to promote the health, safety, morals, or general welfare of the public." Ford Motor Company v. Pace, 206 Tenn., 559, 335 S.W. (2d) 360 (1960).
>
> "This police power of the legislature embraces all matters reasonably deemed necessary or expedient for the safety, health, morals, comfort, domestic peace, private happiness, and welfare of the people." McKesson & Robbins v. Government Employees Department Store, 211 Tenn., 494, 365 S.W. (2d) 890 (1963).
>
> "Legislation affecting alike all persons pursuing the same business under the same conditions is not class legislation." 16 Am. Jur. (2d), Constitutional Law, Section 517, page 904.

It does not matter how many or how few persons are included in the classification. White Stores v. Atkins, 202 Tenn., 180, 303 S.W. (2d) 720 (1957).

The sole test of the constitutionality of any particular classification is that it must be reasonable; that is, made upon a reasonable basis. Kelley v. Byington, 185 Tenn., 421, 206 S.W. (2d) 409 (1947).

> "The later decisions of this Court and of the Federal Supreme Court have conceded to the legislature a very wide range of discretion in the matter of classification in police statutes and revenue statutes. The idea is that, if any possible reason can be conceived to justify the classification, it will be upheld." Ogilvie v. Hailey, 141 Tenn., 392, 210 S.W. 645 (1918).

The reasonableness of any particular classification depends upon the particular facts of the case.

> "There is no general rule by which to distinguish reasonable and lawful from unreasonable and arbitrary classification, the question being a practical one, dependent on experience and varying with the facts in each case." Dillworth v. State, 204 Tenn., 522, 322 S.W. (2d) 219 (1959).

The Chapter of T.C.A. under attack provides for the regulation of persons or other entities engaged in the business of controlling pest and plant diseases. Under Section 43-609: "Any person, firm or corporation who shall for compensation, give advice or engage in work, for the control or eradication of insect pests, plant diseases, pest animals, wood destroying organisms, or who shall solicit such work in any manner, shall first have secured a license from the State Department of Agriculture. Any person desiring such a license shall make written application to the State Department of Agriculture, stating the kind of work for which the license is desired. The person who is to be in charge of the applicant's pest control operation shall then be examined by a pest control licensing board hereinafter provided for." And, "When the pest control licensing board shall have certified to the Department of Agriculture that an applicant is qualified for a license, the Commissioner of Agriculture or his authorized representative shall designate said person as a qualified operator, and shall issue to the applicant a license * * * ." Each applicant must pay a registration fee and furnish a fidelity bond, before engaging in such business.

By the provisions of Section 43-613, "every licensed pest control operator," who is employed, "to prevent, control or eradicate termites," must enter into separate written contracts with each customer from whom he performs any service relating to termite control or eradication. A copy of each contract must be filed with the Department of Agriculture and a fee of $3.00 paid for each contract. All pest control operators, whether in the termite business or

not, are required to file monthly reports, and where an operator is engaged in the termite service, he must report the contracts and pay the fees each month.

Complainant insists Section 43-613 is unconstitutional because the Section singles out termite exterminators and requires them to make and file written contracts, and pay a $3.00 fee. It is argued this constitutes an unlawful and unconstitutional classification. The argument is it is constitutionally unfair to treat termite exterminators any differently than the whole of the pest control industry.

The burden of showing the classification does not rest upon a reasonable basis is upon complainant. Darnell v. Shepard, 156 Tenn., 544, 3 S.W. (2d) 661 (1928); Terrell v. State, 210 Tenn., 632, 361 S.W. (2d) 489 (1962). If any possible reason can be conceived to justify the classification, or if the reasonableness be fairly debatable, this Court must uphold it. Phillips v. State, 202 Tenn., 402, 304 S.W. (2d) 614 (1956).

Complainant insists there are no reasons for imposing the extra statutory burdens of Section 43-613 on termite exterminators, and the requirements of Section 43-613 are not substantially related to public health, safety, or welfare. In support of his contention, he cites Livesay v. Tennessee Board of Examiners in Watchmaking, 204 Tenn., 500, 322 S.W. (2d) 209 (1949), in which this Court held the occupation of watchmaking could not be regulated under the police powers of the State since it did not involve the public health, safety or welfare. Obviously, this case is not in point.

Exhibit "C" to the complainant's bill is a copy of the "Rules and Regulations Governing Pest Control Operators." These regulations, issued by the Department of Agriculture pursuant to Section 43-615, include a detailed schedule of required methods of termite treatment and extermination. The treatment involves the application of highly toxic poisons to private residential as well as commercial buildings. Section 43-615 specifically authorizes the Department

of Agriculture to set certain minimum standards of service and to regulate enforcement of its provisions. The regulations further provide for periodic inspections by the Commissioner or his agents for the purpose of determining whether licensed operators are maintaining the minimum standards. Where the services of an operator are substandard, Section 43-614 provides for suspension or revocation of the license.

When the Sections under attack and the regulations are read, we think it clear the legislature has required the business of termite extermination be regulated in order to protect the health, safety and welfare of the citizens of this State. We do not think the business of watchmaking, as considered in the Livesay case, is analogous to the business of termite eradication.

Further, we do not think it arbitrary or unreasonable to place the business of termite extermination into a single class for the purpose of regulation. No licensed pest control operator has been singled out or discriminated against. All persons, or other entities, engaged in the business of termite extermination must follow the same regulations.

Complainant insists no reason is given in the body of the statute for classifying the business of termite extermination in Section 43-613, and urges that this failure to give a reason renders it unconstitutional. We see no merit in this argument.

The question of whether the business of termite eradication should be regulated to the extent indicated by this Section is a question of public policy, public policy being the present concept of the public welfare or general good. Ford Motor Company v. Pace, supra. This Court has nothing to do with questions of policy. Nashville, Chattanooga & St. Louis Railway v. Marshall County, 161 Tenn., 236, 30 S.W. (2d) 268 (1930). These are considerations solely for the legislature. Motlow v. State, 125 Tenn., 557, 145 S.W. 177 (1911); Davidson County v. Rogers, 184 Tenn., 327, 198 S.W. (2d) 812 (1947).

We are of the opinion it is unnecessary the legislature spell out in the body of a particular Act its reasons for adopting one particular policy or another. "The Courts cannot require the legislature to specify its reasons for a classification." 16 Am. Jur., (2d) Section 496, page 865.

Complainant also argues that Section 43-613 unjustly discriminates against the smaller businesses engaged in termite extermination since it requires a fee of $3.00 for each contract regardless of the size of the contract, whether the contract covers a single house or a large commercial complex. Complainant insists this requirement results in inequality.

A classification is not unconstitutional merely because in practice it results in some inequality, where the classification has a reasonable basis. Cosmopolitan Life Insurance Company v. Northington, 201 Tenn., 541, 300 S.W. (2d) 911 (1957).

So long as the regulation applies equally and consistently to all persons in the same class under similar facts and circumstances, the inequality or differential in the total amount of fees paid is not unconstitutional.

It is next insisted by complainant that Sections 43-609 and 43-613 are so vague, indefinite and ambiguous as to violate the constitutional guarantees of due process.

In considering this question, we do so keeping in mind the basic presumption in favor of the constitutionality of the legislative enactment. Corn v. Fort, 170 Tenn., 377, 95 S.W. (2d) 620, 106 A.L.R. 647 (1936).

> "For the purpose of determining the constitutionality of a statute, it is the function of the court first to ascertain its meaning by the application of ordinary canons of construction, and then to decide whether, as thus construed, the enactment is within the scope of the legislative power.
>
> "It is not the form of a statute or the words that are used, but the object intended and the result reasonably effected by their use that must control the

determination." Peay v. Nolan, 157 Tenn., 222, 7 S.W. (2d) 815, 60 A.L.R., 408 (1928).

It is insisted Section 43-609 is unclear as to who must be licensed; that is, the corporation or an officer or employee thereof or both.

Complainant further argues because of the ambiguity existing in Section 43-609; Section 43-613, regarding the filing of contracts and payment of fees, becomes ambiguous to the extent it would not be an unreasonable construction to require both an employee and the corporation to pay fees.

Finally, complainant asserts the ambiguity of Section 43-609 and 43-613 render Sections 43-614 and 43-617 ambiguous to such an extent they are unenforceable.

Admittedly, at first glance Section 43-609 is somewhat confusing, and difficult to read. The sentences are long and involved in complicated syntax, such terms as "applicant," "person," "qualified operator," and "licensee," are not defined. However, a second reading of the statute reveals its meaning, especially when read in conjunction with the "Rules and Regulations."

It is a familiar rule of statutory construction, where a statute is of doubtful meaning and subject to construction, that administrative interpretations, especially where they are unchallenged over a long period of time, are accorded persuasive weight by the court and will usually be followed unless palpably erroneous. Gallagher v. Butler, 214 Tenn., 129, 378 S.W. (2d) 161 (1963).

From reading the "Rules and Regulations" which were formulated and approved in February of 1961, we find definitions of terms and a full explanation of the application and licensing procedures. These regulations in no way contradict or go beyond the express limitations of Section 43-609 and tend to clarify the confusion which is occasioned by the awkward wording of the Section.

Complainant argues, however, we should not consider the administrative interpretation of the statute, because the

rules of statutory construction and administrative interpretation have no relevancy to the constitutionality of the statute. We do not agree.

The constitutionality of a statute is not determined by its wording or form, but by the object intended and the result effected. Peay v. Nolan, supra.

It is only when the wording of a statute is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," that the statute is unconstitutional. Connally v. General Construction Company, 269 U.S. 385, 70 L.Ed. 322 (1925). Section 43-609 is not so vague or ambiguous that we must guess or differ as to its meaning.

The Sections under attack, when read in their entirety, clearly indicate a person, after examination and certification by the licensing board, becomes a qualified operator. It is also clear a person, firm or corporation must hold a license to do business and this license is issued after an employee or principal obtains a qualified operator's license. This is the construction of the Department of Agriculture. Moreover, this interpretation was evidently understood by complainant. The record reveals licenses were issued to Estrin as a qualified operator and Abbott Exterminating Company to do business in the pest control field in 1959.

It is clear a person must make application and take an examination to qualify for a license as a qualified operator. Obviously, a corporation cannot take an examination.

Section 43-613 plainly states a licensed pest control operator, "shall be required to file with the Commissioner a copy of all contracts for termite service issued during the period covered by the report and shall pay to the department of agriculture an operation fee of three dollars ($3.00) for each contract so reported." We see no ambiguity in this language. It is clear only one copy of each contract is required to be filed and one fee paid for each contract.

The entity, the qualified operator and employees of the entity each are not required to file copies of contracts and pay the fees. This is a reasonable construction of the Section and the construction complainant has been required to follow. There has not been any attempt by defendant to require dual filings of contracts or the payment of more than one fee for each contract. Complainant, therefore, has no standing to attack the constitutionality of the Section.

> "We will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation." Phillips v. West, 187 Tenn., 57, 213 S.W. (2d) 3 (1948); West v. Carr, 212 Tenn., 367, 370 S.W. (2d) 469 (1963).

Section 43-614 is not ambiguous in itself. Nor is it rendered ambiguous by Sections 43-609 and 43-613. The Section clearly states, "any license," may be suspended or revoked after a hearing. Any other interpretation would emasculate the effectiveness of the Section.

With respect to Section 43-617, this Section provides any person, firm or corporation who shall violate any provisions of the Chapter shall be deemed guilty of a misdemeanor and if found guilty thereof shall be required to pay a stated fine. Complainant has not been charged under this Section. Complainant, therefore, has no standing to assert the unconstitutionality of the Section. Phillips v. West, supra; West v. Carr, supra.

Complainant contends empowering the Commissioner and the Department of Agriculture to promulgate rules and regulations constitutes an unconstitutional delegation of legislative power.

The legislature may create laws which delegate to administrative bodies the power to promulgate rules and regulations to carry out the laws. Gamble v. State, 206 Tenn., 376, 333 S.W. (2d) 816 (1960); Tasco Corporation v. Long, 212 Tenn., 96, 368 S.W. (2d) 65 (1963).

Complainant insists Section 43-614 is unconstitutional on the ground that it permits him to be deprived of his license without due process of law.

It is true his license constitutes a property right. State Board of Medical Examiners v. Friedman, 150 Tenn., 152, 263 S.W. 75 (1923). Of course, a property right may not be revoked without due process of law.

Complainant argues four basic reasons for finding the Section in violation of due process: no hearing is required for the suspension of a license; any person who receives notice of suspension or revocation of his license must apply in writing to the Commissioner in order to obtain a hearing; the burden of proof is placed on the recipient of a "notice of intention to revoke license"; and that the Commissioner before whom the hearing must be held acts both as judge and prosecutor, thus he is not fair and impartial as required by due process.

The Section reads that, "any license may be suspended by the Commissioner of Agriculture after a hearing," for various enumerated causes. Complainant alleges violation of due process is based on the following part of the statute:

> "A license shall automatically be suspended should the qualified operator, whose name appears on the license, cease to be in charge of the license holder's pest control operations. * * *"

It is insisted this procedure constitutes a violation of due process, because it fails to provide for a hearing.

We find no merit in this argument for several reasons. In the next paragraph of the same Section, the legislature has specifically provided that any person receiving a notice of suspension of a license may appeal for a hearing by making application to the Commissioner. Furthermore, a one hundred twenty day grace period is allowed before a license is automatically suspended, during which time the licensee may obtain or qualify another of his personnel as a "qualified operator."

The Section further provides:

> "Any person, firm, or corporation receiving a notice of suspension of a license or notice of intention to revoke a license, who desires to appeal for a hearing before the Commissioner of Agriculture, must file an application in writing requesting a hearing before the Commissioner."

Complainant argues since he is required to make application for a hearing such requirement places an unconstitutional burden on him. Complainant cites no authority to support his contention, and we have been unable to find any such authority. In fact, our review of the case law of administrative procedure reveals an application to the administrative agency for a hearing is a customary procedure. We do not see how it might result in a denial of due process.

Section 43-614 provides for adequate notice of the hearing, subpoena of witnesses, representation of all parties by Counsel, preparation of a court record of the proceedings, review of the Commissioner's ruling by certiorari to the Circuit Court, and appeal to the Supreme Court where any party dissatisfied may have a re-examination of the whole matter of law and facts appearing in the record. We think these provisions constitute due process of law insofar as the rights of complainant to a fair and impartial hearing are concerned.

The law is clear that no particular form of procedure is required to constitute due process in administrative hearings. Louisville Gas and Electric Company v. F.P.C., 129 F. (2d) 126 (1942), certiorari denied 318 U.S. 761, 63 S.Ct. 559, 87 L.Ed. 1133; N.L.R.B. v. Prettyman, 117 F. (2d) 786 (1941).

> "Statutory proceedings affecting property rights, which, by later resort to the court, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." Anderson National Bank v. Luckett, 321 U.S. 233, 88 L.Ed. 692, 64 S.Ct. 599, 151 A.L.R. 824 (1943).

The Section does not operate to shift the burden of proof to complainant at a hearing before the Commissioner, as argued by complainant. The Section is silent as to which party has the burden of proof.

> "It is generally held that the proper allocation of the burden of proof is among the essential rules of evidence which must be observed in adjudications by administrative agencies. As in court proceedings the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." 1 Am. Jur. (2d), Administrative Law, Section 391.

In cases involving the revocation or refusal to renew a license, the burden of proof is generally on the State or administrative agency which asserts in favor of revocation. Walker v. City of San Gabriel, 20 Calif. (2d) 879, 129 P. (2d) 349, 142 A.L.R., 1383 (1942); Philadelphia Company v. Securities and Exchange Commission, 84 App.D.C. 73, 175 F. (2d) 808 (1949); Alaska Alcoholic Beverage Control Board v. Malcolm, Inc., 391 P. (2d) 441 (1964).

We are of the opinion Section 43-614 does not shift the burden of proof to a licensee at a hearing before the Commissioner.

We see no merit in the argument the Commissioner would be biased or prejudiced at any hearing of complainant's case, simply because the Commissioner instituted an investigation of complainant's business and authorized a notice of suspension or revocation to be mailed.

It cannot be assumed that the Act will be administered otherwise than in full compliance with the State and Federal Constitutions. Seawell v. Beeler, 199 Tenn., 438, 287 S.W. (2d) 54 (1956).

The fact an administrative board is authorized to make a preliminary investigation and then file charges and also adjudge the controversy at the hearing is not a denial of due process. Smith v. State Board of Accountancy, 271 S.W. (2d) 875 (Ky. 1954).

> "The case law, both federal and state, generally rejects the idea that the combination with judging or prosecuting or investigating functions is a denial of due process, although a few exceptions can be found." 2 Davis, Administrative Law, Section 13.02.

It results all assignments of error are overruled and the decree of the Chancellor is affirmed. Complainant will pay the costs.

/s/ CHESTER C. CHATTIN
Justice

BURNETT, C. J.,
DYER, CRESON AND
HUMPHREYS, JJ., CONCUR.

[Caption Omitted in Printing]

ON PETITION TO REHEAR

Appellant has filed a petition to rehear in which he requests this Court to clarify our original opinion to show the "Notice of Intent to Revoke License," referred to in the opinion, related solely to termite control and not to other activities covered by his license.

This matter was not considered and adjudged by the Chancellor.

> "This Court will not grant relief which was not sought in the trial court, and sought for the first time on a petition to rehear in this Court." Lawler v. McCanless, 220 Tenn., ___, 417 S.W. (2d) 548 (1967).

The petition is denied at the cost of petitioner.

/s/ CHESTER C. CHATTIN
Justice

APPENDIX B

DECREE OF JULY 6, 1967–MINUTE BOOK 78; PAGE 408

ABBOTT ESTRIN, ET AL.

VS. NO. 89772

W. F. MOSS, COMMISSIONER, ETC., ET AL.

IN THE CHANCERY COURT, PART TWO, AT NASHVILLE.

DECREE

This cause was heard on bill and answer pursuant to motion of complainant, argument and briefs of counsel from all of which the Court is of the opinion that Tennessee Code Annotated Section 43-609 through 43-618 do not violate the Constitutions of the United States and the State of Tennessee and therefore are not illegal and void.

The Court is further of the opinion that the rules and regulations promulgated by the Commissioner of Agriculture of the State of Tennessee, pursuant to the provisions of said sections of Tennessee Code Annotated, do not violate the Constitutions of the United States and the State of Tennessee, and, further, that the action of the Commissioner of Agriculture of the State of Tennessee in sending the "Notice of Intention to Revoke License", under dates of January 23, 1967 and February 24, 1967, is in conformity with said sections of the Code and the regulations promulgated by said Commissioner and is therefore not illegal and void.

ALL OF WHICH IS ACCORDINGLY SO ORDERED, ADJUDGED AND DECREED BY THE COURT.

It is further ordered, adjudged and decreed by the Court that the injunction heretofore issued in this cause be, and the same is, hereby dissolved and the original bill dismissed at the cost of complainants for which let execution issue.

_____

CHANCELLOR

This 6th day of July, 1967

APPENDIX C

INSECT PESTS, RODENTS AND PLANT DISEASES CONTROL AND ERADICATION

43-609. BUSINESS OF PEST AND PLANT DISEASE CONTROL—LICENSE. — Any person, firm, or corporation, who shall for compensation, give advice or engage in work, for the control or eradication of insect pests, plant diseases, pest animals, wood destroying organisms, or who shall solicit such work in any manner, shall first have secured a license from the State Department of Agriculture. Any person desiring such a license shall make written application to the State Department of Agriculture, stating the kind of work for which the license is desired. The person who is to be in charge of the applicant's pest control operation shall then be examined by a pest control licensing board hereinafter provided for, and if said board shall find that said person is competent and qualified to do the kind of work in which the applicant desires to engage, said board shall certify this finding to the Department of Agriculture. The Pest Control Licensing Board shall certify qualified aplicants in two classes, to wit: Certification of the first class shall be given to those applicants who are determined by the board to be fully qualified to design or recomemnd treatment procedures and, with full responsibility and without supervision, direct and supervise all pest control work in a specific category. Certification of the second class shall be given to those applicants who are determined by the board to be qualified to give, under general supervision, detailed direction and supervision to laborers and/or treating crews.

When an applicant has been examined by the licensing board and found not qualified to hold the license applied for, he may be re-examined at a subsequent examination date in accordance with regulations promulgated by the licensing board, provided that each application for re-examination shall be accompanied by an examination fee of $10. Pro-

vided further that separate application and examination fee must be filed by the applicant each time that he is re-examined.

When the Pest Control Licensing Board shall have certified to the Department of Agriculture that an applicant is qualified for a license, the Commissioner of Agriculture or his authorized representative shall designate said person as a qualified operator, and shall issue to the applicant a license of the type corresponding to the class of qualification certified by the Board, provided the fees hereinafter required have been paid and the bond hereinafter required is acceptable. The license shall show the class of qualification of the licensee, shall specify the kind of work in which the license holder is authorized to engage, and shall show the name and address of the person, firm, or corporation to which it is issued and also the name of the qualified operator, if the qualified operator is other than the license holder. If the location or address of a license holder shall be changed while a license is in force, it shall be the responsibility of the license holder to notify the Department of Agriculture of this fact, furnishing information of the new location or address, within 10 days of the date of change of location or address. Provided that no person, firm, or corporation shall be licensed as an independent business unless at least one person who is to be in charge of the person's, firm's, or corporation's pest control operation shall have been certified as qualified in the first class as hereinbefore set forth, and provided further that each branch office of a pest control business, firm, or corporation shall be under the direct supervision of a resident qualified operator. Provided further that nothing in the requirements of this section shall be construed to invalidate licenses that have already been granted under statutes or provisions prior to the enactment of this Act. (Acts 1955, Ch. 14, Sec. 1.) (Amended Acts 1961, Ch. 53, Sec. 1.)

43-610. LICENSING BOARD CREATED—MEMBERS — EXAMINATION OF APPLICANTS.—A pest control licensing board is hereby established and such board shall consist of the Commissioner of Agriculture, the Director of Entomology and Plant

Pathology, an entomologist from the teaching, experiment station, or extension staff of the state university, and two licensed pest control operators. The three last named members of such board shall be appointed by the governor for a term of three years except that for the term beginning April 1, 1961 the governor shall appoint one of these board members for a term of one year, one for a term of two years, and one for a term of three years. The board members from the department of agriculture and from the state university shall have the power to designate a representative to serve in their place at a board meeting when other official duties make it impossible for them to attend such meeting in person. Said board shall have authority to determine the qualifications and eligibility of applicants under the provisions of this chapter and the regulations promulgated pursuant thereto, and shall examine such applicants at such periods and in such manner as shall be specified in regulations to be promulgated by said board. No applicant shall be eligible unless he shall have had at least two (2) years experience in the professional services for which an examination is requested or, in lieu thereof, shall have had at least two (2) years study in a recognized college or university majoring in subjects devoted to the professional field in which he proposes to engage. An applicant shall specify the field or fields of pest control in which he desires to secure a license and he shall be examined in any or all of the fields of: Consulting entomology, general; consulting plant pathology, general; structural pest control, household pest control; storage, warehouse, and transportation pest control; fumigation; agricultural pest and disease control, general; agricultural pest and disease control, aircraft application; control of insects affecting man and animals; horticultural spraying; and, rodent control; as shall be applicable to the work in which he proposes to engage. Such applicant must demonstrate a general knowledge of: the pests and/or diseases he proposes to treat or advise treatment for; generally accepted control methods for the aforesaid pests and/or diseases; the chemicals generally accepted and or recommended for use in such control; dosage requirements and methods of

application of such chemicals and hazards pertaining to the use of such poisonous chemicals and precautions necessary for their safe use and handling. (Acts 1955, Ch. 14, Sec. 2) (Amended Acts 1961, Ch. 53, Sec. 2.)

43-611. LICENSE FEE — REGISTRATION AND FEE FOR SOLICITORS.—The fee for the issuance of the license shall be ten dollars ($10.00), and the license shall expire on June 30th of each year. The license holder shall register with the commissioner of agriculture the name of all solicitors and agents, and shall pay to the said commissioner a registration fee of three dollars ($3.00) for each solicitor or agent at the time his name is registered. All registrations shall expire when the license expires. (Acts 1955, Ch. 14, Sec. 3.)

43-612. LICENSE BOND — SUITS AGAINST PRINCIPAL AND SURETY.—Each applicant for a license shall furnish to the Department of Agriculture, before license is issued, a fidelity bond satisfactory to the commissioner and conditioned that the principal therein named shall honestly conduct said business in accordance with the pest control laws of this state and the rules and regulations promulgated thereunder and shall faithfully perform pest control work that he has contracted to do. The amount of bond shall be one thousand dollars ($1,000). Provided further that any person having a right of action against such licensee may bring suit against the principal and sureties of such bond. (Acts 1955, Ch. 14, Sec. 4.) (Amended Acts 1961, Ch. 53, Sec. 3.)

43-613. WRITTEN CONTRACTS MANDATORY —FEE FOR EACH CONTRACT—MONTHLY REPORTS.—Every licensed pest control operator shall enter into a written contract with the person, firm, or corporation employing him to prevent, control, or eradicate termites and a separate contract must be given for each structure or building except that an industrial complex or group of buildings may be covered by a single contract when they are integral parts of one industrial unit, and a garage, pump

house, or other out-building commonly a part of a residential establishment may be covered by the same contract as that covering the residence itself provided such garages, etc., are not used as separate residential units. In the case of pretreatment of new structures the contracts or warranties required by the Federal Housing Administration, the Veterans Administration, or other federal agency, shall be construed to be contracts and deemed sufficient to satisfy the requirements of this section. Each licensed pest control operator shall be required to report each month's business to the department of agriculture within 15 days of the end of each calendar month. At the time the licensed pest control operator files his report of the previous month's business he shall be required to file with the commissioner of agriculture a copy of all contracts for termite service issued during the period covered by the report and shall pay to the department of agriculture an operation fee of three dollars ($3.00) for each contract so reported. If any licensed pest control operator shall fail, neglect, or refuse to file the monthly report required above, by or before the specified date, such operator shall be required to pay a penalty of $5.00 and an additional penalty for contracts that are not filed by the specified date in the amount of 10% of the operation fees required by this section for such contracts. (Acts 1955, Ch. 14, Sec. 5.) (Amended Acts 1961, Ch. 53, Sec. 4.)

43-614. LICENSE REVOCATION — HEARING.— Any license may be suspended by the commissioner of agriculture after a hearing for any of the following causes:

(1) If the license holder shall receive compensation for advice or for work pertaining to the control or eradication of insect pests, plant diseases or rodents, other than that covered by the license.

(2) If the license holder or any employee, solicitor or agent or representative shall make misrepresentation for the purpose of defrauding, or shall make promises which are not carried out, or shall use methods or materials which are not suitable for the

purpose for which they are employed, or shall fail to meet minimum standards as set forth in regulations promulgated under the provisions of this act.

(3) If the license holder shall fail to give the state department of agriculture or its duly authorized representative, upon request, true information regarding methods and materials used, work performed, or other information essential to the administration of this chapter.

(4) If the license holder shall fail to make the registrations and/or reports required in Section 43-611 and 43-613 or shall fail to pay the fees required therein.

(5) If the license holder shall otherwise fail to conduct his business as required by this act or by rules and regulations promulgated under the provisions of this act.

A license shall automatically be suspended should the qualified operator, whose name appears on the license, cease to be in charge of the license holder's pest control operations, provided that a grace period shall be extended to such a license holder sufficient for another person to be examined in accordance with Sec. 43-609 and regulations adopted thereunder, but provided further that such grace period shall not extend for more than 120 days. Any license suspended under this provision shall remain suspended until some duly qualified person shall be designated as qualified operator for the office or firm whose license has been suspended. Any suspension shall continue until the violations or circumstances causing such suspension have been corrected or removed to the satisfaction of the commissioner of agriculture.

Any license may be revoked by the commissioner of agriculture for any of the above reasons when violations are wilful or persistent or for any serious or flagrant violation of the requirements of this act or regulations promulgated thereunder. Any person, firm, or corporation receiving a notice of

suspension of a license or notice of intention to revoke a license, who desires to appeal for a hearing before the commissioner of agriculture, must file an application in writing requesting a hearing before the commissioner. Such application for hearing must be filed with the commissioner of agriculture, at Nashville, within ten days (10) from the date of issuance of said enforcement order. Upon filing the application for review, the commissioner of agriculture shall set a date for hearing and the date of said hearing shall be set within thirty days (30) from the day the application is filed. However, the actual date of the hearing before the commissioner need not be within said thirty-day period. The commissioner of agriculture is empowered to subpoena witnesses and compel their attendance at hearings authorized hereunder. All parties to the proceeding, including the person making application for the hearing, shall have the right to be represented by counsel and shall also have the right to have subpoenas issued by the commissioner to compel the attendance of all witnesses deemed by such parties to be necessary for a full and complete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law for legal witnesses, which fees and mileage shall be paid as a part of the cost of such proceeding.

At the hearing provided for herein, the commissioner shall provide a stenographer or court reporter to take a stenographic record of the evidence adduced at such hearing. The applicant or protestant shall be entitled to a copy of said stenographic record upon application thereof and upon paying the reasonable cost thereof to be fixed by the commissioner. At the conclusion of the hearing the commissioner shall issue the order and make such findings in his discretion as the record justifies.

The action of the commissioner and the order issued by the commissioner may be reviewed by petition for common law writ of certiorari, addressed to the Circuit Court of Davidson County, which petition shall be filed within ten days (10) from the date the order of the commissioner is made.

Immediately upon the grant of the writ of certiorari the commissioner shall cause to be made, certified and forwarded to said court a complete transcript of the proceedings in said cause, which shall contain all the proof submitted before the commissioner. All defendants named in the petition desiring to make defense shall answer or otherwise plead to said petition within ten days (10) from the date of the filing of said transcript unless the time be extended by the court.

Said decision of the commissioner shall be reviewed by the circuit court solely upon the pleadings and the transcript of the proceedings before the commissioner, and neither party shall be entitled to introduce any additional evidence in the circuit court.

Either party dissatisfied with the judgment or decree of the circuit court may, upon giving bond as required in other suits, appeal to the Supreme Court, and have a re-examination, in that court, of the whole matter of law and fact appearing in the record. Provided that when any such appeal is made the clerk of the circuit court in which such suit was pending shall include as a part of the record the original certified transcript of the proceedings had before the commissioner of agriculture when identified by the trial judge instead of a bill of exceptions, which need not be made and filed. (Acts 1955, Ch. 14, Sec. 6.) (Amended Acts 1961, Ch. 53, Sec. 5.)

43-615. RULES AND REGULATIONS — MINIMUM STANDARDS.—The commissioner of agriculture is hereby authorized and required to promulgate rules and regulations for the enforcement of this chapter and for the definition of minimum technical standards for the methods to be used in the performance of pest control by persons licensed under the provisions of this chapter. (Acts 1955, Ch. 14, Sec. 7.)

43-616. PERSONS AND PROPERTY EXEMPT.—This chapter shall not apply to anyone working on his own premises or to wage employees under direct supervision of the person who owns or is in charge

of the property on which the pest control work is being done, or to the sale of insecticides or fungicides provided these are labeled to show the name and address of the manufacturer, or vendor, the specific purposes for which recommended, and the directions for use. (Acts 1955, Ch. 14, Sec. 8.)

43-617. PENALTY.—Any person, firm or corporation who shall violate any provision of this chapter shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not less than fifty dollars ($50.00) for the first offense and not less than one hundred dollars ($100.00) for each subsequent conviction. (Acts 1955, Ch. 14, Sec. 9.)

43-618. DISPOSITION OF FUNDS COLLECTED. —All funds collected under the provisions of this chapter shall be paid into the treasury of the state, and the same are hereby appropriated exclusively to the department of agriculture to be used in carrying out the provisions of this chapter. (Acts 1955, Ch. 14, Sec. 10.)
Acts of 1961, Ch. 53

PASSED: February 8, 1961

APPROVED: February 16, 1961

APPENDIX D

REGULATIONS ISSUED UNDER THE PEST CONTROL LAW

Chapter 14, Public Acts of 1955
Chapter 53, Public Acts of 1961

We, William F. Moss, Commissioner of Agriculture, State of Tennessee, and H. L. Bruer, Director of Entomology and Plant Pathology, State of Tennessee, by virtue of and pursuant to the authority of the Tennessee Pest Control Act, Section 7, Chapter 14, Public Acts of 1955, being Sections 43-609 through 43-618, inclusive, of the Tennessee Code Annotated, Chapter 53, Public Acts of 1961, and the general statutes relating to the issuance of rules and regulations, being Sections 4-501 through 4-506, inclusive, as amended, Tennessee Code Annotated, do hereby promulgate these rules and regulations.

DEFINITIONS

A. "Kind of work" or "field of work" shall be construed to mean the specific insects, plant diseases, or other pests in the control of which the licensee or prospective licensee shall propose to engage.

B. A "qualified operator" is the person responsible to the licensee for the application of measures for the control or eradication of insects, plant diseases, pest animals or other pests. The name of the qualified operator or operators shall appear on the license. Crew foremen, trainees, and helpers shall be under the direct supervision of a qualified operator.

C. "Branch office" shall be construed to mean any location other than the main or home office or point of headquarters or principle operation of a firm from which pest control activities are carried out. The maintenance of personnel and/or equipment at a point from which, sales are made

or solicited, or service rendered shall constitute a branch office within the meaning of these regulations. Each such branch office shall be under the direct supervision of a resident qualified operator.

D. "Resident qualified operator" shall be construed to mean an operator qualified in either of the classes as provided for by law and who is domiciled at or near each office or branch office. The pest control activities of each such office or branch office shall be supervised by such resident qualified operator or operators as are designated for the office during all regular work periods during which service is rendered. (Sec. 43-609, TCA, as amended).

E. "Commissioner" means the Commissioner of Agriculture, Tennessee Department of Agriculture.

F. "Department" shall mean Tennessee Department of Agriculture.

G. "Board" shall mean the Pest Control Licensing Board as described in 2 of the Act.

REGULATIONS

1. The applicant or license holder is responsible for providing bond and providing a qualified operator in the kind of work in which he shall practice. The license holder shall register with the Commissioner of Agriculture the name of all solicitors and agents.

2. A license and bond shall be required for each office or branch office maintaining either personnel or equipment and from which work is sold or contracted for locally and from which service is rendered. Each such office or branch office shall be in charge of a resident qualified operator. Each principal office must be under the supervision of a resident qualified operator of the first class as defined by law. A branch office may be under the supervision of a qualified operator of

the second class, as defined by law, provided that no such qualified operator of the second class may be assigned or designated to supervise activities of more than one such branch office.

When an individual has been in business for himself in this or in another state he shall not be eligible for a solicitor's license unless he can show he does not possess equipment to do the work. (Sec. 43-609, TCA, as amended).

3. How to Obtain a License;

(A) Application for license shall be submitted on a form furnished by the Department of Agriculture, and shall be filed at least three (3) days in advance of the next examination date. With his application, the applicant shall furnish copies of contracts which he proposes to use in the event a license is issued. The Department shall require the applicant to furnish names of references. No application for examination will be accepted unless the applicant shall have had two years experience in the professional services for which an examination is requested, or in lieu thereof, shall have had two years study in a recognized college or university, majoring in qualifying subjects.

(B) The applicant, if he is also an operator, or his designated operator, shall take an examination which may be oral, written, or both, as determined by the Board. A license when issued may be renewed annually by the payment of stipulated fees unless it has been revoked for cause; provided, that no license shall be renewed unless such licensee shall be actively engaged in the business or occupation for which he is licensed or shall have been so engaged within a six-months period immediately preceding the renewal date.

(C) Preliminary written examinations will be given within the first ten (10) days of the months of March, June, September, and

December. These preliminary examinations will be held in the cities of Memphis, Nashville, and Knoxville. Those applicants who correctly answer at least 70% of the questions on this preliminary examination will be notified of the date and hour to appear for completion of the examination before the assembled Pest Control Licensing Board at the next regular meeting.

The Pest Control Licensing Board will meet within the first ten (10) days of the months of January, April, July, and October. At that time the Board will further examine the applicants successfully passing the last preliminary examination by giving two or three written questions (all of which must be correctly answered for a license of the first class), together with such oral questions as the Board may deem necessary to determine the eligibility of the applicant.

(D) If the qualifications and other requirements of the applicant are satisfactory, the Board shall certify such fact to the Commissioner or his agent and shall stipulate the class of license for which the applicant is qualified as set forth by law. The Department shall then issue a license of the class certified by the Board and such license shall expire June 30 of each year.

(Sec. 43-609, TCA, as amended)

(E) Applicants who successfully pass the preliminary examination will be expected to appear before the Board at its next regular meeting on the date and at the time he is notified to appear. If illness or some other factor should make his appearance impossible or, if not impossible, a grave hardship, it shall be the responsibility of the applicant to advise the Board of these circumstances and request the completion of his examination at the regular meeting of the next quarter. The Board will then notify

the applicant of the alternative date and time set for him to appear. Failure of the applicant to make the notification and request stipulated above or failure of the applicant to appear on the alternative date, either of these, shall void his preliminary examination and, if the applicant shall still desire a license, he shall be required to file a new application and take another preliminary examination.

(F) If the Board shall determine that the applicant is not qualified for a license, then said applicant may be re-examined at the next regular examination. However, at the discretion of the Board, a third examination for any applicant may be deferred for six months after the second examination and the fourth or any succeeding examination may be deferred for one year following the third or any subsequent examination. Each application for re-examination must be accompanied by payment of ten ($10) dollars as required by law. (Sec. 43-609, TCA, as amended)

4. If, for any reason, the applicant's license is declared invalid, the Commissioner or his representative shall notify in writing the person to whom the license has been issued. The bonding company will be notified of the action taken, but the suspending or the revoking of a license shall in no way invalidate the bond for the duration of the contracts entered into by the licensee.

5. Reports:

(A) Each licensed pest control operator shall be required to report each month's business to the Department of Agriculture within 15 days of the end of each calendar month. Forms for these reports will be furnished by the Department and a report must be filed whether or not any service was performed. (Sec. 43-613, TCA, as amended)

(B) In addition to the reports required above, persons operating under licenses for termite control must enter into written contracts for all termite control work and must file copies of same with the Department of Agriculture as required by law. They must also report to the Department of Agriculture any cancellations, extensions, or transfers of contracts previously reported.

(Sec. 43-613, TCA, as amended)

(C) Failure to submit the reports as outlined above shall make the operator liable to the penalties set forth by law. For purposes of this section the date a report is postmarked shall be construed to govern whether a report is delinquent or not. Neglect or failure to pay the penalties imposed under this section shall be grounds for suspension of licenses as provided by law.

(Sec. 43-613, TCA, as amended)
(Sec. 43-614, TCA, as amended)

6. Termite Requirements:

Persons operating under licenses for termite control shall conform to the following regulations, or shall use other Department approved methods:

(A) A written contract shall be executed on every termite control job, one copy to be left with the property owner or his agent, a copy sent to the Department of Agriculture, and a copy retained by the operator. The contract should be for the termite treatment only. Where reconstruction work is done, it shall be figured separately from the termite treatment and retain its identity in the contract. If there is any doubt as to what is termite treatment or reconstruction, each can be handled by separate contracts.

(B) On each termite contract job, the operator shall give the following minimum service,

unless the contract shall specifically state why any requirement is unnecessary, or that the owner assumes the responsibility:

(1) Remove all scraps of wood or other debris or trash subject to attack by termites from underneath the building.

(2) Remove all wooden contacts between building and soil, both outside and inside. Wooden supports under building must rest on concrete footing or brick capped with concrete, or covered with a metal shield, the top of the brick or footing being not less than six (6) inches above the ground.

(3) Scrape off all termite tunnels from foundation walls and pillars.

(4) Cut adequate trenches in soil in contact with masonry around all foundation walls and pillars. Fill trenches with approved chemical at the stipulated rate as set forth in sub-paragraphs (7) and (8) below. The soil immediately around the point that pipes enter the soil shall be saturated with chemical.

When pipes have a non-metal packing that is not removed, care must be taken that the soil treatment above mentioned is sufficient to insure penetration of the soil below a depth to which such packing extends.

(5) Treat all hollow pillars, tile walls, foundation walls, chimneys, or any other structure likely to be penetrated by termites by injecting and flooding with an approved chemical at the stipulated rate as set forth in sub-paragraphs (7) and (8) below. All such structures must be drilled where necessary for flooding or be rodded to the footing.

(6) Treat concrete porches in contact with building by excavating area adjacent to house, trenching and applying chemicals underneath in the same manner as around pillars and foundation. If earth-filled terraces or porches cannot be voided, the fill must be treated by rodding or drilling. If drilled, it is preferable that drilling be from the top. In any case, it is the operator's responsibility to show that an adequate treatment has been given.

(7) Chemicals and Concentrations:

A. Soil Treatment:

To soil areas to be treated, apply one of the following chemicals at not less than the designated concentration:

Chemicals	Concentrations
Aldrin	0.5% applied in oil solution or water emulsion.

Chemicals	Concentrations
Benzene Hexachloride	0.8% of gamma isomer applied in oil solution or water emulsion.
Chlordane	1.0% applied in oil solution or water emulsion.
Dieldrin	0.5% applied in oil solution or water emulsion.
DDT	8.0% in oil solution
Lindane	0.8% in oil solution or water emulsion.

Trichlorobenzene 1 part to 3 parts oil.

Other materials may be used provided:

1. They are determined to be acceptable by the FHA, Architectural Standards Division, Washington, D. C.; or,
2. They meet a 5-year test conducted by the U. S. Forest Service, U. S. Department of Agriculture, or other established and generally recognized research agency; or,
3. They contain one or more of the above mentioned chemicals in the concentration recommended.

(8) Application;

A. Floor Joist Construction:

1. Existing Structures:

A. Apply to critical areas along foundation walls, around piers, and under slabs of porches, entrance platforms, patios, attached garages, carports, etc.

B. Apply at a rate of 1 gallon per 2½ lineal feet per foot of depth along both sides of foundation walls, piers, etc.

C. Voids of unit masonry foundation walls and piers, apply to voids at a rate of 1 gallon per 5 lineal feet.

2. Pre-treatment:

Make same application at the same rate stipulated above for existing structures and in addition, apply under porch floors,

entrance platforms, patios, attached garages, carports, etc., an overall treatment at a rate of 1 gallon per 10 square feet.

B. Slab-on-ground construction:

Treatment shall not be made when the soil or fill is excessively wet or immediately after heavy rains, to avoid surface flow of the toxicant from application site.

1. Pre-treatment:

A. Apply an over-all treatment under entire surface of floor slab including porch floors, entrance platforms, patios, attached garages, carports, etc., apply at a rate of 1 gallon per 10 square feet, except that if fill under slab is a coarse material, such as washed gravel, cinders, crushed stone, etc., apply at a rate of 1 gallon per 7 square feet.

B. Apply to critical areas along both sides of foundation wall at a rate of 1 gallon per 2½ lineal feet per foot of depth.

C. Voids of unit masonry foundation walls, apply at a rate of 1 gallon per 5 lineal feet.

2. Existing Structures:

Soil area under slab or adjacent thereto must be adequately treated at the known or potential termite entry areas such as, expansion joints, masonry voids, service entry points, etc.

(9) Reinspection:

Each property under contract by a termite control operator shall be re-examined by the operator at least annually or on owner's application. A report of the re-examination and all subsequent inspections showing the condition of the property with respect to the presence or absence of termites shall be filed with the property owner and a copy kept in the operator's files subject to inspection by the Department.

(10) At such times as he may deem desirable the Commissioner of Agriculture or his authorized representative shall examine properties treated for the purpose of determining the efficiency of the treatment given. Whenever unsatisfactory or substandard treatments are found, the operator and licensee will be notified and given a reasonable length of time in which to correct such conditions. If the operator shall neglect or refuse to make such corrections, his license will be suspended as provided for by law, unless he can show to the satisfaction of the Department of Agriculture why such action should not be taken. While his license is suspended, the operator or licensee shall have the privilege of examining and retreating all properties on which he has current contracts but shall not solicit any new business on penalty of immediate cancellation of his license. He shall notify the Department of Agriculture of the dates of all re-examinations and retreatments. When all properties previously reported in an unsatisfactory condition have been re-examined and re-treated, the Department of Agriculture shall then make the re-inspections at its earliest con-

venience. If the Department of Agriculture, on re-inspection, shall find all the properties in satisfactory condition, the suspension shall be removed, otherwise, the license of the operator shall be cancelled permanently. It is provided that the license of an operator or licensee may be cancelled immediately for gross neglect of contracts and general failure to give satisfactory service. (Sec. 43-614, TCA, as amended)

7. Where a gas, highly poisonous to human beings, is used to fumigate household pests, stored products, warehouses, etc., the following rules should be adhered to:

   (A) Possess at the place where the fumigation is being done a gas mask that is protective against the gas being used.

   (B) Post the building with conspicuous signs at all points of entry, including basement, that the property is being fumigated and no one should enter.

   (C) At all buildings, exclusive of vaults, ships, boxcars, trailers, etc., a guard shall be placed at the fumigation, even though it is posted as noted in (B) above, to prevent irresponsible persons from entering. The guard shall have access to a protective gas mask should it be needed.

   (D) A qualified operator shall be present and actively in charge of all fumigation work at the time the poison is being introduced or handled and shall check the evacuation prior to re-entry by persons not engaged in the fumigation procedure.

8. Notification shall be given as far in advance as possible to all beekeepers in the area where airplane dusting for insect or pest control is to be done. Notification to the Department of Agri-

culture as far as possible in advance of the time of the dusting shall be sufficient notice to comply with this regulation. The materials having the least toxic qualities to honeybees shall be used whenever possible.

9. The Department will investigate complaints against license holders and will check each operator's work from time to time, inspecting any or all jobs performed as seems best to the Department. Operators are required to furnish to the Department, on demand, true and complete information on number and identity of jobs performed, methods and materials used, or other information necessary to the enforcement of the Act.

10. Suspension or Revocation of License:

Licenses may be suspended or revoked for fraud, misrepresentation, violation or contract, using improper materials, or for other reasons specified in the Act, and for violation of any of the provisions of the Act or the Regulations promulgated pursuant thereto, as provided by law. (Sec. 43-613, TCA, as amended)

11. All rules and regulations heretofore promulgated on this subject are hereby revoked.

/s/ W. F. MOSS
Commissioner
Date: March 16, 1961

/s/ H. L. BRUER
Director of Entomology
& Plant Pathology
Date; March 16, 1961

Approved: March 20, 1961.

/s/ GEORGE F. McCANLESS
Attorney General

Filed with the Secretary of State on March 22, 1961.

/s/ JOE C. CARR

APPENDIX E

[Affidavit]

My name is Lester A. Meis and I reside at 25 Jade Drive in Victoria, Texas. I am president and technical director of the "Bugmobile" companies with corporate offices at 2305 North Laurent in Victoria, Texas, and at 4301 South Port in Corpus Christi, Texas.

I hold an A.B., B.S., and Master of Public Health degree from the University of California in bacteriology, Public health sanitation and public health engineering.

I have had in excess of 20 years experience in the field of general pest and rodent control, food plant sanitation and public health engineering.

I have worked for the Alameda County Health Department in California, the State Health Department of California, the U.S. Public Health Service, Orkin Exterminating Company and Texas Sanitation Company, Inc.

I am considered an expert in the field of public health sanitation, food plant sanitation and rodenticides and pesticides; serving on the pesticide committee of the American Public Health Association, I have served and serve as an industrial consultant in the field of food plant sanitation.

I am a "Fellow of the Royal Society of Health" and a "Fellow of the American Public Health Association" and an active member of the National Association of Sanitarians.

The State of Tennessee divides their licensing groups as follows:

As far as the need for protection of the public is concerned, there is little or no difference between the ten categories listed below except with reference to Termite Control which is reported under category #3–

1. Consulting Entomology.
2. Consulting Plant Pathology.

3. Structural Pest Control–household.
4. Storage, warehouse and transportation Pest Control.
5. Fumigation.
6. Agricultural Pest and Disease Control.
7. Agricultural Pest and Disease Control–aircraft application.
8. Control of Insects affecting Man and Animals.
9. Horticultural Spraying.
10. Rodent Control.

Other than for the fact that categories 1 and 2, where the public can be given misinformation and possibly cause extensive damages money-wise, categories 4 through 10 deserve much more regulation than category 3–which is Structural Pest Control–household.

Categories 4 through 10 utilize materials that are up to one hundred times more lethal than termite control chemicals. As an example, category 6–Agricultural Pest and Disease Control, the chemical Parathion is used extensively in treating crops and Parathion has an acute lethal dosage in milograms per kilogram (mg/kg) of 3.6 and 6.8 oral and dermal. Chlordane, the chemical of choice in termite control has an oral LD-50 of 335 and a dermal of 690–almost exactly one hundred times less toxic. If anything, the public need be protected on categories 4 through 10 whereas categories 1 through 3 have negligible public contact.

Categories 4 though 10 all utilize materials of high toxicity, in fact on a regular basis it could be said that the toxicity varies between 50 and 150 times that which is used in general termite control.

Some further examples–under category 4 (Storage, warehouse and transportation Pest Control) and category 5 (fumigation), where the use of Cyanide and Methal Bromide is extensive, both are highly toxic gasses.

There are very low specific skin threshold limits on toxic gasses whereas the skin threshold limit for chlorinated hydro carbons used in termite control are negligible.

Rodenticides under category 10 are very highly toxic as one part per million of 1080 or sodium flouracetate could be considered a toxic dose whereas there has never been a recorded case of a lethal dose of termiticide. One part per million of sodium flouracetate would be a lethal dose whereas 50,000-100,000 parts per million of Chlordane in water dilution or other termiticides would probably be considered a lethal dosage.

For the State of Tennessee to pick out one category such as #3—Structural Pest Control—household—as being in need of constant supervision compared to the other licensed categories is both fallacious and ridiculous.

Of the 10 categories, the ones that would require the least regulation with reference to dangers to the customer would be categories 1, 2 and 3.

The following are cited:

1. Journal of Environmental Health, the publication of the National Association of Sanitarians, Denver, Colorado.
2. Pest Control, the journal of the National Pest Control Association, published by Trade Magazines, Cleveland, Ohio.
3. Chemical and Natural Control of Pests, Reinhold Publishing Company of New York (1960).
4. Scientific Guide (2nd edition) to Pest Control Operations published by the Trade Magazines, Cleveland, Ohio.

It is my considered opinion that the dangers involved in termite control and the need for inspection as opposed to the dangers to the public in other fields is nil. The prime example being the toxicity of the materials used.

The public is never exposed to termite control materials as these materials are delivered to the control sites either beneath the slabs of the houses or beneath the subflooring of said houses and unless an individual specifically crawls

beneath the house he would never be exposed to the toxic materials. Such is not the case in categories 4, 5, 6, 7, 8, 9 or 10 where accidents do and have occurred and toxic materials have been and are used on a daily basis and where people can be harmed.

From a thorough search of the literature, it is shown that there has never been a proved case of poisoning involved in the use of termiticides, whereas the reason given for taxation put on to each termite contract by the State of Tennessee is "the treatment involving termites utilizes toxic poisons which are applied to private residences as well as commercial buildings". This statement is a half-truth and is absolutely arbitrary and unreasonable as the taxation has no basis of fact—utilizing the premise that termite control is more hazardous than other categories licensed and therefore need "more inspectional methods and control".

There are many pest control organizations that do termite control and also do work under the state of Tennessee categories 4, 5, 6, 7, 8, 9 and 10. As far as I know there are few, if any, companies that restrict themselves to termite control only as termite control has always been one of those many services performed by a general pest control company. None of the large corporations of this nation—whether they operate in Tennessee or not—limit themselves to only termite control. Conversely, we can say that as far as we know, there are no companies known as termite control organizations that limit themselves strictly to termite control but do at some time render service in all of the categories enumerated by the State of Tennessee. Therefore I must state that those organizations that practice termite control are not in a readily distinguishable class by themselves.

In my opinion, the State of Tennessee dividing termite control into a distinguishable class with reference to taxation is arbitrary, unreasonable and capricious and I can see no justification whatsoever for this subdivision either as a practice of the industry or based on factual distinctions between the treatments employed.

/s/ Lester A. Meis, M.P.H.
Public Health Engineer

Date: 11 October 1968

[Jurat Omitted in Printing]

APPENDIX F

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Herbert R. Rich, who after being duly sworn according to law, deposes and says:

That on or about February 6, 1967, I attended a meeting in the office of Paul Jennings at Nashville, Tennessee. Mr. Jennings is an Assistant State Attorney General and was handling charges preferred by the Department of Agriculture for the State of Tennessee against my client, Abbott Exterminating Company, a Tennessee corporation.

The charges involved certain violations allegedly committed by my client for which the State of Tennessee was seeking to revoke his license to operate. I had requested the meeting to discuss the charges and present at the meeting was Mr. H. L. Bruer representing the Department of Agriculture. Following a lengthy discussion I suggested that the charges be settled by my client paying all sums allegedly due to the State together with penalty and interest. Mr. Bruer stated that he would accept the offer provided the company, in addition to the said payment, surrender its license to operate.

I replied in substance that this was not a settlement at all since the State was offering no consideration for our agreement to pay and Mr. Bruer stated that criminal charges could be preferred and that the payment would be a way to avoid the preferral of such charges. Mr. Jennings took a passive position throughout the meeting and indicated to me that whatever settlement could be worked out with the Department of Agriculture would be acceptable to him.

Further deponent saith not.

/s/ HERBERT R. RICH
Deponent

[Jurat dated 11 October 1968]

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FILED
DEC 16 1968

No. 684.

IN THE

SUPREME COURT OF THE UNITED STATES.

ABBOTT ESTRIN, Individually and as President of Abbott Exterminating Company and ABBOTT EXTERMINATING COMPANY, a Corporation,
Appellants,

v.

W. F. MOSS, Commissioner of Agriculture of Tennessee, H. L. BRUER, Director, Division of Plant Industries in the Tennessee Department of Agriculture; and GEORGE F. McCANLESS, Attorney General of Tennessee,
Appellees.

On Appeal from the Supreme Court of the State of Tennessee.

MOTION TO AFFIRM.

GEORGE F. McCANLESS,
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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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No. 684.

IN THE

SUPREME COURT OF THE UNITED STATES.

ABBOTT ESTRIN, Individually and as President of Abbott Exterminating Company and ABBOTT EXTERMINATING COMPANY, a Corporation,
Appellants,

v.

W. F. MOSS, Commissioner of Agriculture of Tennessee, H. L. BRUER, Director, Division of Plant Industries in the Tennessee Department of Agriculture; and GEORGE F. McCANLESS, Attorney General of Tennessee,
Appellees.

On Appeal from the Supreme Court of the State of Tennessee.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the Supreme Court of the State of Tennessee be affirmed on the ground that the questions presented are so unsubtantial as not to warrant further argument.

STATEMENT.

This is an appeal from the final judgment and decree entered on June 26, 1968, by the Supreme Court of the State of Tennessee. Said decision is reported at 430 S. W. 2d 345. Appellants sought to set aside the judgment of the Chancery Court for Davidson County that the provisions of Chapter VI of Title 43 of the Tennessee Code Annotated were not violative of the provisions of the Constitutions of the United States or of the State of Tennessee. Appeal to this Court is pursuant to 28 U. S. C., § 1257 (2).

On January 23, 1967, and February 24, 1967, appellants, Abbott Estrin and Abbott Exterminating Co., were mailed documents styled as "Notice of Intention to Revoke License", such style being dictated by the terms of T. C. A., § 43-614 (Appendix, Jurisdictional Statement of Appellant—pp. C-6 and C-7). The statutory basis for the charges, same being set forth in T. C. A., § 43-613 (Appendix, Jurisdictional Statement of Appellant—pp. C-4 and C-5), was set forth in the said notice, together with the specific violations which were to be the basis of any action by the Department of Agriculture. The aforesaid notices charged 1398 separate violations of T. C. A., § 43-614.

On March 8, 1967, the Chancery Court of Davidson County issued a preliminary injuction which restrained appellees from further action with regard to a hearing on the charges, pending a determination of the constitutionality of certain provisions of Chapter VI, Title 43 of the Tennessee Code Annotated. As previously noted, the decision of both the Chancery Court and the Supreme Court of Tennessee upheld the challenged Act. An injunction has remained in effect pending exhaustion of appellant's remedies.

The issues presented to the state court were: whether T. C. A., § 43-613, and the regulations issued pursuant thereto were violative of the Constitution of either the United States or the State of Tennessee as an unlawful classification of the pest control industry and thus an unconstitutional exercise of the police powers by the Legislature of the State of Tennessee; whether T. C. A., §§ 43-609, 43-610 and 43-613, are so vague and ambiguous as to be unconstitutional; and whether the provisions of T. C. A., § 43-614, dealing with revocation of licenses adequately met the requirements of due process. The State court determined there was no constitutional violation. Appeal to this Court is predicated upon unreasonable classification; inequality of application of the tax; and violation of the due process in that the Commissioner of Agriculture is both the charging party and the hearing officer.

ARGUMENT.

1. The Classification Is Not Arbitrary or Unreasonable.

The decision of the State court adequately dealt with the questions now presented to this Court and that decision is plainly correct. The holdings of this Court, as are briefly set forth below, are to the same effect as those state decisions cited by the Tennessee court.

This Court in **Goldblatt v. Town of Hempstead,** 369 U. S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130, held that a town ordinance prohibiting excavations below two feet above maximum ground water level was a valid exercise of the town's police power. The Court therein set forth the relevant standards which are determinative of whether substantial questions are now presented to the Court. The Court stated:

> "Our past cases leave no doubt that appellants had the burden on 'reasonableness.' E. g., Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 529, 79 S. Ct. 962, 3 L. ed. 2d 1003 (exercise of police power is presumed to be constitutionally valid); Salsburg v. Maryland, 346 U. S. 545, 553, 74 S. Ct. 280, 98 L. ed. 281, 289 (the presumption of reasonableness is with the State); United States v. Carolene Products Co., 304 U. S. 144, 154, 58 S. Ct. 778, 82 L. ed. 1234 (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it)." 369 U. S. at 596.

Further, the Court noted:

> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has

> generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. ed. 385, is still valid today: 'To justify the State . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are resonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' " 369 U. S. at 594-595.

In **East New York Savings Bank v. Hahn**, 326 U. S. 230, 232-233, 66 S. Ct. 69, 90 L. Ed. 34, the Court stated:

> "The State has the 'sovereign right . . . to protect the . . . general welfare of the people. . . .' Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' "

This rule was approved in **El Paso v. Simmons**, 379 U. S. 497, 508-509, 85 S. Ct. 577, 13 L. Ed. 2d 446.

In the instant cause appellants seek to establish that a substantial question is presented with regard to "classification" by two basic points: (1) the Tennessee court failed to consider the reasonableness of the act of the Tennessee legislature in establishing termite control as a separate group and (2) that the poisons and procedures used by operators performing termite control are less dangerous "than the other licensed categories of pest control."

It is absolutely clear that the Tennessee court, following a consideration of the standards applicable, addressed itself to whether a reasonable classification had been established. The Tennessee court at 430 S. W. 2d at 349 set forth the appellants' argument as follows:

"Complainant insists there are no reasons for imposing the extra statutory burdens of Section 43-613 on termite exterminators, and the requirements of Section 43-613 are not substantially related to public health, safety, or welfare."

The Court then stated:

"Exhibit 'C' to the complainant's bill is a copy of the 'Rules and Regulations Governing Pest Control Operators.' These regulations, issued by the Department of Agriculture pursuant to Section 43-615, include a detailed schedule of required methods of termite treatment and extermination. The treatment involves the application of highly toxic poisons to private residential as well as commercial buildings. Section 43-615 specifically authorizes the Department of Agriculture to set certain minimum standards of service and to regulate enforcement of its provisions. The regulations further provide for periodic inspections by the Commissioner or his agents for the purpose of determining whether licensed operators are maintaining the minimum standards. Where the services of an operator are substandard, Section 43-614 provides for suspension or revocation of the license.

"When the Sections under attack and the regulations are read, we think it clear the legislature has required the business of termite extermination be regulated in order to protect the health, safety and welfare of the citizens of this State."

Appellees submit that it is absolutely clear that the Tennessee court found the classification to be reasonable.

Appellants only attempt to carry their burden is by a belated affidavit appended to the "Statement as to Jurisdiction" (Appendix E). It is clear that the statements included therein are offered for the first time to this Court

and are the mere opinions of a self styled expert who also happens to be an interested party. The matters presented therein are not properly before the Court; however, assuming their correctness, the standards established by this Court for the establishment of unreasonableness are not met, i. e. appellants have not carried their burden of proof.

In the cause at issue the appellants are concerned that persons engaged in the field of termite control are more rigidly regulated than certain other named persons. This argument does not, without more, demonstrate that the Legislature has acted arbitrarily and without reasons in the establishment of the termite control classification. The question is whether the complainants have carried their burden of showing that the classification of termite control operators is arbitrary and further, that the Legislature had no conceivable reason for the classification.

This Court may of its own knowledge notice that the field of termite control is more closely related to the individual homeowners than any of the other listed fields, which are primarily commercially oriented. Additionally the Court may notice and the Legislature may have reasonably concluded that termite control involves a modus operandi which renders the individual home-owners helpless to determine the degree of termite protection which he has received and the degree of safety with which the treatment was performed. For example, it is not difficult to determine if pest or rodent control has been effective but contrarily the damage to the homeowner may be accomplished before he can determine if termite control has been effective. Trained personnel are required to determine if a building has in fact been treated for termites and if the treatment will be or has been effective. Finally, it may be asserted that the regulations applicable to termite control operators may suggest that the Legislature

had reason to believe that the public should be offered protection from the activities of those in the termite control business, while the same factors did not exist in other fields.

The regulations of the Department of Agriculture, for example Nos. 6, 7, 8, and 9 set forth the precise steps to be taken in the area of termite control and in areas where protection of the individual home-owner is required. It is obvious that random checking is required to determine if these regulations are being complied with. It is equally clear that such checking of the work of a termite exterminator may more easily be accomplished if there is systematic disclosure. It will be further noted that all funds collected under the provisions of Chapter VI of Title 43 shall be used in carrying out the provisions of the chapter. T. C. A., § 43-618.

Appellants respectfully submit that the classification is not so lacking in rational justification as to constitute a constitutional deprivation. The "concern here is with power not with wisdom." **Helvering v. Davis**, 301 U. S. 619, 644, 57 S. Ct. 904, 81 L. Ed. 1307. It is the assertion of the appellants that the Legislature of the State of Tennessee has the power to regulate and control the activities of termite control operators and to bring them under State supervision in the interest of the public.

It is respectfully submitted that this "state of facts either known or which (can) be reasonably assumed" affords sufficient support for the upholding of the constitutionality of the questioned legislation.

2. There Is No Inequality in the Application of the Tax.

Appellees further submit that there is no inequality in the application of the tax. T. C. A., § 43-613 states that:

"Every licensed pest control operator shall enter into a written contract with the person, firm, or corporation employing him to prevent, control, or eradicate termites and a separate contract must be given for each structure or building except that an industrial complex or group of buildings may be covered by a single contract when they are integral parts of one industrial unit, and a garage, pump house, or other out-building commonly a part of a residential establishment may be covered by the same contract as that covering the residence itself provided such garages, etc., are not used as separate residential units. In the case of pretreatment of new structures the contracts or warranties required by the Federal Housing Administration, the Veterans Administration, or other federal agency, shall be construed to be contracts and deemed sufficient to satisfy the requirements of this section."

The requirement is that **every** licensed operator shall enter into a written contract for **each** structure.

The concept of equal protection has been traditionally viewed as requiring uniform treatment of persons under like circumstances and conditions. **Reynolds v. Sims**, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506; **Griffin v. Illinois**, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891. This standard is met by the above statute. The legislature is not required to establish a taxing schedule based upon an elaborate scheme of the percentage of profits per job.

In **Fox v. Standard Oil**, 294 U. S. 83, 99, 55 S. Ct. 332, 79 L. Ed. 777, the Court observed:

"'When the power to tax exists the extent of the burden is a matter for the discretion of the lawmakers. . . . 'Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone.'"

The legislature has not exceeded its authority by requiring that a three dollar tax be imposed upon every operator for each contract.

3. Procedural Due Process Is Met.

Finally appellants assert that the bias of the Commissioner of the Department of Agriculture for the State of Tennessee is shown when the Department refused to consider any procedure other than the hearing procedure as set forth in T. C. A., § 43-614. Appellant seeks to support his position by another affidavit which contains information presented for the first time to this Court. Appellees submit that the Court should not be concerned with this information but without waiving this objection would invite the attention of the Court to certain facts, some of which are apparent therein. The appellee, H. L. Bruer, is Director of the Division of Plant Industries for the Department of Agriculture of the State of Tennessee and is responsible for the enforcement of Chapter 6, Title 43 of the Tennessee Code Annotated. The record reflects that the Notices of Intention to Revoke were signed both by the Commissioner of Agriculture, appellee W. F. Moss and appellee Bruer who is primarily responsible for the administration of the chapter. It is apparent from the affidavit that appellee Bruer attended the referenced meeting and the Commissioner did not attend. The irrelevance of such meeting is therefore apparent as the decision announced at that time was by the enforcement authority, i. e., appellee Bruer and the Commissioner was not presented those facts.

The thrust of appellant's contention is that when a party charged with 1398 separate violations of a statute offers restitution for the alleged illegal conduct and such offer is rejected, leaving the party to the statutory hearing processes, bias must be presumed. The imagination of no one is extended by the universal appeal of such a

proposal to flagrant law violators after charges are placed against them.

The provisions of T. C. A., §43-614, meet the standards of due process and are not questioned by appellants. Further, there is nothing unusual about the "charging" procedure adopted by the Department of Agriculture of the State of Tennessee, an administrative agency.

Appellees averred in their answer that the Department of Agriculture and the Commissioner of the said Department are not primarily in the position of prosecuting for alleged offenses and that, therefore, the initiating of proceedings and judging of the said proceedings can be combined. It was further averred by the appellees that the issuance of the notice of intention is merely the procedure followed in the initiation of the complaint and that this is the usual procedure wherein a subordinate officer decides whether or not to recommend to the department head that proceedings be initiated. Lastly, it was averred that no prejudgment of the facts can be shown. These averments must be taken as true to the extent factual questions are presented. 1 Gibson, **Suits in Chancery**, Sec. 447 (5th Ed. 1955).

"The case law, both federal and state, generally rejects the idea that the combination with judging of prosecuting or investigating functions is a denial of due process, although a few exceptions can be found." 2 Davis, **Administrative Law**, Sec. 13.02; **Marcello v. Bonds**, 349 U. S. 302, 75 S. Ct. 757, 99 L. Ed. 1107; **Shaughnessy v. United States**, 349 U. S. 280, 75 S. Ct. 746, 99 L. Ed. 1074. **F. T. C. v. Cement Institute**, 333 U. S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948); **Pangburn v. C. A. B.**, 311 F. 2d 349, 356 (1st Cr. 1962), and cases cited therein.

The problem presented herein is aptly summarized in the following from 2 Davis, **Administrative Law**, Sec. 13.10, at 237-238 (1958):

"In a typical prosecuting agency a subordinate officer to whom investigators report decides whether or not to recommend to the agency heads that proceedings be instituted. The agency heads study the recommendation and the supporting materials to whatever may be necessary to dispose of the problem." . . .

(1) it is a distortion to say that . . . an agency . . . is taking a position on factual issues by the issuance of a complaint, except to the extent of finding a prima facie case on the facts and determining that the allegations, if proved, are sufficient as a matter of law. This closely resembles a judge's task of deciding on demurrer—and no one would contend that a judge who overrules a demurrer should be disqualified from proceeding to try the case. The difference is that the agency heads who approve the issuance of a complaint do not merely assume that the allegations of fact are admitted for demurrer purposes, but they must to some extent appraise the factual materials to determine whether or not the investigators have produced enough to justify prosecution. Perhaps the closest analogy is the granting of a temporary restraining order by a judge who then proceeds to hear evidence on the question of a temporary or permanent injunction. The award of the restraining order commits the judge to some extent as to his view of the probably facts in advance of a full development of the evidence."

Appellees submit that the State court properly held that it cannot be presumed that the Act will be administered otherwise than in compliance with federal and state constitutional directives. The power of the Court to pass upon the constitutionality of a statute will arise only when the interest of litigants require the use of that judicial authority for their protection against actual in-

terferences, a hypothetical threat being insufficient. **United Public Workers v. Mitchell,** 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754. Nothing presented to this Court suggests bias upon the part of the Commissioner of Agriculture. Any circumstances tending to show bias may be presented to the proper authorities when and if a hearing is conducted on the charges.

CONCLUSION.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment of the State court should be affirmed.

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GEORGE F. McCANLESS,
Attorney General,

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PAUL E. JENNINGS,
Assistant Attorney General,
Counsel for Appellees.

Certificate of Service.

I, Paul E. Jennings, certify that I have mailed a copy of the foregoing Motion to Affirm, by First Class Mail, to the Honorable Robert W. Healty, Esq., Putbrese and Fletcher, Tiber Island, 1257—4th Street, S. W., Washington, D. C. 20024, and Honorable Ben West, Esq., Commerce Union Bank Building, Nashville, Tennessee, this 12th day of December, 1968.

.....

Paul E. Jennings,
Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ESTRIN, ETC., ET AL. *v.* MOSS, COMMISSIONER, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION.

No. 684. Decided January 13, 1969.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.